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Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 19/2018 concerning Arash Sadeghi (Islamic Republic of Iran)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 11 December 2017, the Working Group transmitted to the Government of the Islamic Republic of Iran a communication concerning Arash Sadeghi. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Sadeghi is a 34-year-old Iranian national. At the time of his first arrest, Mr. Sadeghi was a student at Allameh Tabataba'i University and resided in Tehran.

5. On 9 July 2009, Mr. Sadeghi, together with a number of other students, peacefully protested in front of his university against the results of the presidential election. During that protest, Mr. Sadeghi was arrested by Ministry of Intelligence officials. The source alleges that he was taken to Ward 209 of Evin Prison, interrogated and tortured for 90 days. He was subsequently released on bail.

6. On 23 December 2009, Mr. Sadeghi was arrested again in front of his residence. He was taken to Ward 209 of Evin Prison, and released on bail on 14 March 2010. Five days after his release, Mr. Sadeghi was again arrested due to his activism. He was taken to Ward 209 of Evin Prison and kept there until 13 June 2010. On that day, Branch 26 of the Revolutionary Court announced his preliminary sentence to be five years' imprisonment for "assembly and collusion against the regime", as well as one year's imprisonment for conducting "propaganda against the system".

7. On 23 October 2010, Mr. Sadeghi was granted furlough on bail. According to the source, Mr. Sadeghi did not return to prison at the end of the furlough, and the security forces raided his home at midnight. Only Mr. Sadeghi's mother and another female relative were present at the time. The source alleges that the security forces broke down the door of his home and attacked them. Mr. Sadeghi's mother was hit on the head with a baton, which caused her to suffer a brain haemorrhage. At the time of the raid, Mr. Sadeghi's mother also suffered a heart attack, which caused her death four days later.

8. After his mother's funeral, Mr. Sadeghi was summoned to Ward 209 of Evin Prison, where he spent a further 24 days. He was then transferred to Ward 350 of the same prison. Approximately one year later, after repeated appeals by Mr. Sadeghi, the Court of Appeal handed down a four-year suspended sentence for the charge of "assembly and collusion against the regime", and one year in prison for conducting "propaganda against the system". The source alleges that, during his first trial, Mr. Sadeghi had no access to legal counsel.

9. On 14 December 2011, after spending a total of 27 months in prison, Mr. Sadeghi was released. However, one month later, on 15 January 2012, Mr. Sadeghi was again arrested by security agents. According to the source, that arrest followed Mr. Sadeghi's enquiries about his earlier complaint concerning the death of his mother. The source alleges that Mr. Sadeghi received threatening telephone calls and was later arrested. His family did not receive any information about him for 18 months. During that period of time, Mr. Sadeghi was detained in Wards 209 and 240 of Evin Prison, where he was interrogated and tortured. The source claims that the authorities attempted to extract a statement from Mr. Sadeghi that his mother had died of natural causes. The authorities also attempted to force Mr. Sadeghi to withdraw his complaints regarding his mother's case while he was being recorded on video. On 12 October 2013, Mr. Sadeghi was released on bail.

10. In February 2014, Mr. Sadeghi got married. He was banned from continuing his studies for a Master's degree in philosophy, so he opened a stationery shop with a former cellmate. On 6 September 2014, Mr. Sadeghi was arrested again, together with his wife, his business partner and another friend. He was taken to Ward 2A of Evin Prison. The source states that Ward 2A is under the supervision of the Revolutionary Guard and not the judiciary. The source alleges that Mr. Sadeghi was interrogated for seven months by intelligence officers. During the first month following his arrest, he could hear the interrogation of his wife, which deeply affected him. The source reports that Mr. Sadeghi spent over six months in solitary confinement in Ward 2A and several days in Ward 8 of Evin Prison. On 14 March 2015, he was released on bail.

11. According to the source, Mr. Sadeghi's trial took place in May 2015 and on 21 July 2015 at Branch 15 of the Revolutionary Court. During the trial, Mr. Sadeghi was denied access to his lawyer. The source alleges that Mr. Sadeghi's lawyer contacted the presiding

judge on several occasions and requested to see his client's file. However, all the lawyer's requests were repeatedly denied and he was not allowed to be present at the trial hearings.[1]

12. On 21 August 2015, the Revolutionary Court sentenced Mr. Sadeghi to a total of 15 years' imprisonment. He was sentenced to seven and a half years' imprisonment for "assembly and collusion in the form of propaganda against the State" (article 610 of the Islamic Penal Code); three years' imprisonment for "insulting the founder of the Islamic Republic of Iran" (article 514 of the Islamic Penal Code); three years' imprisonment for "publishing lies in cyberspace" (article 18 of the Cyber Crime Law), and eighteen months' imprisonment for "propaganda against the regime" (article 500 of the Islamic Penal Code). The source notes that article 500 of the Islamic Penal Code is frequently used by the authorities to restrict the peaceful exercise of the rights to freedom of expression, assembly and association.

13. On 22 December 2015, the Court of Appeal of Branch 54 of the Revolutionary Court in Tehran examined Mr. Sadeghi's appeal. On that occasion, Mr. Sadeghi was granted access to a lawyer. The Court of Appeal upheld the original verdict.

14. The source reports that the most recent arrest of Mr. Sadeghi occurred on 7 June 2016, when he went to the court in Evin Prison following a summons letter that had been sent to the wrong address.[2] Mr. Sadeghi was arrested in court and taken to Ward 2A of Evin Prison. Mr. Sadeghi was then transferred to Ward 8 of Evin Prison.

15. Mr. Sadeghi's total sentence is 19 years' imprisonment. In addition to the sentence of 15 years' imprisonment upheld on 22 December 2015, Mr. Sadeghi was ordered to serve the four-year suspended sentence handed down by the Court of Appeal in 2010 during his previous trial. However, under article 134 of the Islamic Penal Code, which limits sentences for individuals charged with multiple offences to the maximum sentence for the most serious charge, Mr. Sadeghi's actual time in prison should be limited to seven and a half years.

16. On 18 October 2017, Mr. Sadeghi was transferred from Evin Prison in Tehran to Rajai Shahr Prison. The source alleges that he was beaten during the transfer. The source submits that forcing an individual to serve a sentence in a prison that is not located in his or her city of residence is an additional sentence, which should be taken into account in the final verdict. In Mr. Sadeghi's case, that additional sentence was not mentioned.

17. According to the source, Mr. Sadeghi is currently being held in Salon 10 of Rajai Shahr Prison. His health is very fragile due to a hunger strike. He has lost 22 kg and currently weighs only 48 kg. He cannot eat solid food. In March 2016, doctors recommended protein injections, but Mr. Sadeghi has not yet received them. Furthermore, he has not received any other medical treatment and his family was told to provide his medication. The authorities rejected an application for Mr. Sadeghi's release on medical furlough. Salon 10 of Rajai Shahr Prison does not have a heating system or running hot water. Detainees have to cover themselves with carpets, and heat water in order to wash themselves. The facility does not have a refrigerator and detainees are not given meat at mealtimes.

18. Since his transfer to Rajai Shahr Prison, Mr. Sadeghi has not been allowed to visit his wife, who also remains in detention. He was allowed to do so during the last months of his detention in Evin Prison.

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[1] According to the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, the evidence presented to support the charges against Mr. Sadeghi had consisted of printed copies of his social media messages and emails to journalists and human rights activists abroad. See A/HRC/34/65, para. 56.

[2] On 7 June 2016, Mr. Sadeghi visited the prison to enquire about the official start date of his term of imprisonment and was immediately detained and forced to begin his prison sentence. Mr. Sadeghi had not received the summons and wanted to prevent an unannounced raid on his home as had happened in the past. This information is found in a joint urgent appeal addressed to the Government, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=3251.

19. The source submits that Mr. Sadeghi has been sentenced for exercising his rights to freedom of expression and peaceful assembly.

Communications from special procedure mandate holders

20. Mr. Sadeghi has previously been the subject of four joint urgent appeals addressed to the Government by various special procedure mandate holders, including the Working Group on Arbitrary Detention, on 16 February 2012, 22 July 2016, 27 October 2016 and 23 March 2017.[3] The Working Group acknowledges the responses received from the Government on 29 December 2016 and 11 July 2017 in relation to three of those communications.[4]

21. The special procedure mandate holders requested the Government to comment upon numerous allegations, including that Mr. Sadeghi's combined 19-year prison sentence does not take into consideration article 134 of the Islamic Penal Code in order to limit his prison term to the longest sentence for the most serious charge. In its responses, the Government confirmed that article 134 is applicable to Mr. Sadeghi's case, meaning that he is required to serve a maximum sentence of seven and a half years, and is eligible for release on 21 April 2023. The Government also noted in its responses that Mr. Sadeghi receives visits from his family.

Response from the Government to the regular communication

22. On 11 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information, by 12 February 2018, on Mr. Sadeghi's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his detention, and their compatibility with the obligations of the Islamic Republic of Iran under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Sadeghi.

23. On 18 December 2017, the Government requested an extension of the deadline for reply. The extension was granted, with a new deadline set at 12 March 2018. The Working Group regrets that, despite that extension, the Government did not submit any information in response to the regular communication. Although not obliged to do so, the Working Group has decided to take into account the information received from the Government in response to the above-mentioned joint urgent appeals.[5]

Discussion

24. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

25. In determining whether Mr. Sadeghi's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence regarding evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to

[3] Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=19675, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=3251, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=22820, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23034.

[4] Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=76385, and https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=7653.

[5] According to paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained. In the present case, in order to give the Government every opportunity to respond to the source's allegations, the Working Group has exercised its discretion to take into account the information submitted by the Government in response to the joint urgent appeals. See also opinions No. 79/2017 and No. 48/2016, in which the Working Group took a similar approach.

rest upon the Government if it wishes to refute the allegations. The Government can meet that burden of proof by producing documentary evidence in support of its claims.[6] Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

26. The source alleges that Mr. Sadeghi has been deprived of his liberty solely for peacefully exercising his rights to freedom of expression and assembly under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

27. Given that the Government did not reply to the regular communication, the Working Group has considered other reliable information that supports the source's claims, particularly its previous opinions concerning arbitrary arrests and detention in the Islamic Republic of Iran.[7] In these cases, findings have been made about the arbitrary deprivation of liberty of individuals who had peacefully exercised their rights under the Universal Declaration of Human Rights and the Covenant, demonstrating that this is a systemic problem in the administration of criminal justice in the Islamic Republic of Iran.

28. The Secretary-General and the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran have also expressed concern about the detention of individuals in the Islamic Republic of Iran for exercising their rights to freedom of expression and peaceful assembly, including with reference to the specific situation of Mr. Sadeghi.[8] Moreover, the Special Rapporteur called upon the Government to immediately and unconditionally release all those who had been arbitrarily arrested, detained and prosecuted for exercising their rights to freedom of opinion and expression, specifically stating that both Mr. Sadeghi and his wife were human rights defenders who had been imprisoned for peacefully exercising their rights to freedom of expression and association. The Special Rapporteur said that she was deeply concerned about the continuous detention of human rights defenders in the Islamic Republic of Iran, who had been tried on the basis of vaguely defined offences and had received heavy sentences following trials marred by due process violations. Such defenders were left with no other option but to put their lives at risk through hunger strikes to contest the legality of their detention.[9] The Working Group also takes note of the four joint urgent appeals issued in relation to the situation of Mr. Sadeghi between 2012 and 2017.

29. In addition, there is widespread concern among States Members of the United Nations about the application of criminal law in the Islamic Republic of Iran to restrict the exercise of human rights. That concern is reflected in at least 15 of the recommendations contained in the 2014 report of the Working Group on the Universal Periodic Review on the Islamic Republic of Iran, which relate to the detention of individuals for the peaceful exercise of the freedoms of expression, assembly and association.[10] Moreover, the General Assembly has urged the Islamic Republic of Iran to end widespread and serious restrictions,

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[6] See opinion No. 41/2013, in which it is noted that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out": *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at p. 661, para. 55.

[7] See, e.g., opinions Nos. 48/2017, 9/2017, 25/2016, 2/2016, 1/2016, 44/2015, 16/2015, 55/2013, 52/2013, 18/2013, 54/2012, 48/2012, 30/2012, 58/2011, 21/2011, 20/2011, 8/2010, 6/2009, 39/2008, 34/2008, 26/2006, 19/2006, 8/2003, 30/2001, 39/2000, 14/1996, 28/1994 and 1/1992.

[8] See, e.g., A/HRC/37/24, para. 40; A/72/562, paras. 46 and 49; A/72/322, para. 35; A/HRC/34/65, para. 56; and A/HRC/34/40, para. 61.

[9] See Office of the United Nations High Commissioner for Human Rights, "Iran: "Prisoners of conscience at risk of dying after prolonged hunger strike" – UN expert warns" (9 January 2017). Available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21071.

[10] See A/HRC/28/12, paras. 138.184, 138.222–227 and 138.230–237.

in law and in practice, on the right to freedom of expression, opinion, association and peaceful assembly, and to release persons arbitrarily detained for the legitimate exercise of those rights.[11]

30. According to the source, Mr. Sadeghi was convicted and sentenced to 15 years' imprisonment under the following provisions:[12]

(a) Article 500 of the Islamic Penal Code, according to which anyone who engages in any type of propaganda against the Islamic Republic of Iran or in support of opposition groups and associations is to be sentenced to three months to one year of imprisonment;

(b) Article 514 of the Islamic Penal Code, according to which anyone who, in any manner, insults the founder of the Islamic Republic or the Supreme Leader, shall be sentenced to imprisonment of between six months and two years;

(c) Article 610 of the Islamic Penal Code, according to which when two or more individuals collude and conspire to commit crimes against the national or foreign security of the country or prepare the facilities to commit the aforementioned crimes, unless they are regarded as *mohareb* [engaging in war against God and the State], they shall be sentenced to two to five years' imprisonment;

(d) Article 18 of the Cyber Crime Law, according to which any person who uses computer and telecommunication systems to publish, or share publicly by other means, lies and libellous material, with the intention of harming another person, or agitating and upsetting the minds of people or State officials; or anyone, who, with the same intentions as the above-mentioned ones, attributes some statements and conducts falsely and in a manner contrary to the actual events, either independently or indirectly and by quoting third parties, regardless of whether or not these actions inflict material losses on others, or damage their reputation and character, then in addition to the damages they have to pay to restore someone's loss of reputation (if needed), they will be sentenced to a prison term ranging from 91 days to two years, or to a cash fine of 5 million to 40 million Iranian rials, or both.

31. In the present case, the Government did not submit any evidence that Mr. Sadeghi's activism and participation in protests involved violence of any kind. On the contrary, Mr. Sadeghi was arrested on 15 January 2012 for following up on his complaint about his mother's violent death, which allegedly occurred at the hands of the security forces.[13] In the absence of such information, Mr. Sadeghi's convictions under the above-mentioned provisions of the Islamic Penal Code cannot be regarded as being consistent with the Universal Declaration of Human Rights or the Covenant. There is nothing to suggest that the permissible restrictions under articles 19 (3) and 21 of the Covenant would apply in the present case. Moreover, as the Human Rights Committee has stated in paragraph 47 of its general comment No. 34 (2011) on the freedoms of opinion and expression, imprisonment is never an appropriate penalty in defamation cases, including the punishment provided under article 18 of the Cyber Crime Law.

32. The Working Group concludes that Mr. Sadeghi has been deprived of his liberty as a result of the peaceful exercise of his rights to freedom of expression and assembly under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. His deprivation of liberty is therefore arbitrary under category II.

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[11] See General Assembly resolution 71/204, para. 13.

[12] The information provided by the source indicates that Mr. Sadeghi was sentenced to a longer period of imprisonment than the maximum penalty under each of these provisions (see para. 12 above). If this information is correct, that situation should have been corrected on appeal. The Government's responses to the joint urgent appeals suggest that the information may be correct. The source did not raise this point in its submissions to the Working Group. If Mr. Sadeghi serves a longer sentence for each offence than that provided for by law, his detention will have no legal basis according to category I.

[13] While the source did not raise this point, the Working Group considers that it is unlikely that there was a legal basis for this arrest and detention from 15 January 2012 to 12 October 2013, as it appears to have related solely to Mr. Sadeghi's attempt to pursue his complaint about his mother's death.

33. The Working Group considers that the above-mentioned provisions of the Islamic Penal Code are so vague and broad that they could, as in the present case, result in penalties being imposed on individuals who had merely exercised their rights under international law. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.[14] In the present case, the application of vague and overly broad provisions adds weight to the Working Group's conclusion that Mr. Sadeghi's deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

34. Given its finding that the deprivation of liberty of Mr. Sadeghi was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Sadeghi should have taken place. However, Mr. Sadeghi was tried by Branch 15 of the Revolutionary Court in May 2015 and on 21 July 2015, and the Working Group considers that his right to a fair trial was violated during that trial and during his subsequent appeal on 22 December 2015. The Working Group considers that the Revolutionary Courts that tried Mr. Sadeghi and heard his appeal do not meet the standards of an independent and impartial tribunal under article 14 (1) of the Covenant.[15]

35. The source alleges that Mr. Sadeghi did not have access to legal assistance during his first trial in 2010 (which resulted in a four-year suspended sentence that Mr. Sadeghi is now required to serve), and during his trial in May and July 2015. Mr. Sadeghi's lawyer contacted the presiding judge on several occasions during the second trial, and requested to see his client's file. However, all his requests were repeatedly denied and he was not allowed to be present at the trial hearings. The absence of legal assistance at both trials constitutes a violation of Mr. Sadeghi's rights under article 14 (3) (b) and (d) of the Covenant. According to principles 16, 19 and 21 of the Basic Principles on the Role of Lawyers, the Government was obliged to ensure that Mr. Sadeghi's lawyer could perform his professional functions without improper interference, including appearing before the court during the second trial, and that he had access to Mr. Sadeghi's file in order to provide effective legal assistance in that matter. The Government failed to meet those obligations.

36. The source also alleges, and the Government has not contested, that Mr. Sadeghi was held in solitary confinement for over six months following his arrest on 6 September 2014. The imposition of prolonged solitary confinement in excess of 15 consecutive days is prohibited under rules 43 (1) (b), 44 and 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Moreover, the authorities have violated Mr. Sadeghi's right to contact with the outside world in failing to inform Mr. Sadeghi's family for 18 months of his arrest on 15 January 2012 (in a situation that appears to have been akin to incommunicado detention), in failing to allow Mr. Sadeghi to meet with his wife, who is also detained, and in transferring Mr. Sadeghi to another prison outside Tehran and away from his home and family. These actions constitute violations of rules 43 (3), 58 and 59 of the Nelson Mandela Rules, and principles 15, 16 (1), 19 and 20 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Finally, given the allegations that Mr. Sadeghi has been tortured and ill-treated by the authorities,[16] the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

37. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Sadeghi an arbitrary character

[14] See, e.g., opinion No. 41/2017, paras. 98–101.

[15] See E/CN.4/2004/3/Add.2, para. 65. The Working Group considers that this finding regarding the Revolutionary Courts remains current.

[16] This includes the alleged failure to ensure that Mr. Sadeghi received urgently needed medical treatment, discussed further below, and placing him in a cell where he could hear the interrogation of his wife.

according to category III. Given the serious allegations in the present case, the Working Group also refers this matter to the Special Rapporteur on the Islamic Republic of Iran.

38. In addition, the Working Group considers that Mr. Sadeghi was targeted because of his activities as a human rights defender. He has been repeatedly arrested and detained for his participation in peaceful protests in defence of human rights in the Islamic Republic of Iran and for his activism. Accordingly, the Working Group finds that Mr. Sadeghi was deprived of his liberty on discriminatory grounds, that is, due to his status as a human rights defender, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. His deprivation of liberty is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders for further consideration.

39. The Working Group wishes to express its grave concern regarding Mr. Sadeghi's physical and mental health. The source reports that Mr. Sadeghi's health is in a very fragile state and that he has lost a substantial amount of weight. He is unable to eat solid food, and has not received protein injections that were recommended by his doctors and that can only be administered in a hospital outside his prison. Furthermore, he has not received any other medical treatment and his family was told to provide his medication. The authorities rejected an application to release Mr. Sadeghi on medical leave. The conditions in which he is being detained at Rajai Shahr Prison are not conducive to good health, as there is no heating system, running hot water or refrigeration for food. The Government stated in its responses to the joint urgent appeals that Mr. Sadeghi was in good health and that, according to the prison's physician, his general condition was normal. While these responses were provided by the Government over nine months ago, the Government could have provided updated medical records from independent physicians in support of its claims, but did not do so.

40. According to article 10 (1) of the Covenant and rules 1, 24 and 27 (1) of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including enjoying the same standards of health care that are available in the community. In particular, rule 27 (1) requires that all prisons ensure prompt access to medical attention in urgent cases, and that prisoners who require specialized treatment or surgery be transferred to specialized institutions or to civil hospitals. Mr. Sadeghi has now served almost two years of his current sentence of imprisonment, which began on 7 June 2016, having been arrested no fewer than six times since 2009 for exercising his rights under international human rights law. The Working Group calls on the Government to immediately and unconditionally release Mr. Sadeghi, and to ensure that he is transferred to a hospital as a matter of urgency to receive medical treatment.

41. The present case is one of several brought before the Working Group in the past five years concerning the arbitrary deprivation of liberty of persons in the Islamic Republic of Iran.[17] The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty, in violation of fundamental rules of international law, may constitute crimes against humanity.[18] The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the use of imprecise provisions of the Islamic Penal Code to prosecute individuals for the peaceful exercise of their rights, a practice that continues to result in the arbitrary deprivation of liberty in the Islamic Republic of Iran.

42. The Working Group would also welcome the opportunity to conduct a country visit to the Islamic Republic of Iran. Given that a significant period of time has passed since its most recent visit to the Islamic Republic of Iran in February 2003, the Working Group considers that now is an appropriate time to conduct another visit. The Working Group notes that the Government issued a standing invitation to all thematic special procedure

[17] See, e.g., opinions Nos. 92/2017, 49/2017, 48/2017, 9/2017, 7/2017, 50/2016, 28/2016, 25/2016, 2/2016, 1/2016, 44/2015, 16/2015, 55/2013, 52/2013, 28/2013 and 18/2013.

[18] See, e.g., opinion No. 47/2012, para. 22.

mandate holders on 24 July 2002, and looks forward to a positive response from the Government to its country visit request made on 10 August 2016.

43. Given that the human rights record of the Islamic Republic of Iran will be subject to review during the third cycle of the universal periodic review in November 2019, an opportunity exists for the Government to enhance its cooperation with the special procedures and to bring its laws into conformity with international human rights law.

Disposition

44. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Arash Sadeghi, being in contravention of articles 2, 7, 9, 10, 11 (1), 19 and 20 of the Universal Declaration of Human Rights and of articles 2 (1), 9, 14, 19, 21 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, III and V.

45. The Working Group requests the Government of the Islamic Republic of Iran to take the steps necessary to remedy the situation of Mr. Sadeghi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

46. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Sadeghi's health, the appropriate remedy would be to release Mr. Sadeghi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

47. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of Mr. Sadeghi's liberty, including his numerous arrests on past occasions, and to take appropriate measures against those responsible for the violation of his rights.

48. The Working Group requests the Government to bring its laws, particularly articles 500, 514 and 610 of the Islamic Penal Code and article 18 of the Cyber Crime Law, into conformity with the recommendations made in the present opinion and with the commitments made by the Islamic Republic of Iran under international human rights law.

49. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on torture; (b) the Special Rapporteur on the Islamic Republic of Iran; and (c) the Special Rapporteur on human rights defenders, for appropriate action.

50. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.[19]

Follow-up procedure

51. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Sadeghi has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Sadeghi;

(c) Whether an investigation has been conducted into the violation of Mr. Sadeghi's rights and, if so, the outcome of the investigation;

[19] The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. Available at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Islamic Republic of Iran with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

52. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

53. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

54. The Government should disseminate through all available means the present opinion among all stakeholders.

55. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[20]

[*Adopted on 20 April 2018*]

[20] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 20/2018 concerning William Yekrop (Australia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 22 December 2017 the Working Group transmitted to the Government of Australia a communication concerning William Yekrop. The Government replied to the communication on 21 February 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. William Yekrop, born in 1984, is a Dinka man from South Sudan (as it is now known). He usually resides at the Christmas Island Immigration Detention Centre, Australia.

Background

5. The source reports that Mr. Yekrop's early life in the Sudan and in an Egyptian refugee camp was marked by hardship, violence and tragedy. He grew up in the Sudan during the second Sudanese civil war between the Government of the Sudan and the Sudan People's Liberation Army, which was reportedly one of the longest and bloodiest civil wars ever recorded. Approximately 2 million people died during that war and approximately 4 million people were displaced. In addition, it was reportedly marked by gross human rights violations, including the use of child soldiers, amputation of limbs and sexual slavery.

6. The source indicates that Mr. Yekrop's father served with the Sudan People's Liberation Army as a soldier. Mr. Yekrop was approximately 5 years old when his father was killed. Before and after his father's death, he experienced extreme violence, including being trained as a child soldier and witnessing many deaths. According to the source, Mr. Yekrop's family was forced to flee the Sudan when his older brother turned 18 years old and was in danger of being conscripted by the Sudanese military, which fought against the Sudan People's Liberation Army. If Mr. Yekrop's brother had been conscripted, he would have been forced to fight against his own people and family, and his dead father's fellow soldiers. As a result, Mr. Yekrop and his family fled from the Sudan to an Egyptian refugee camp.

7. According to the source, Mr. Yekrop remembers feeling scared and in danger for the three years his family lived in the refugee camp in Egypt. As there was limited humanitarian assistance available at this camp, both Mr. Yekrop and his brother worked to support the family.

8. The source reports that on 22 August 2003, Mr. Yekrop, his mother and his siblings were granted humanitarian visas. On 10 October 2003, Mr. Yekrop and his family arrived in Australia, when he was approximately 16 years old. In granting Mr. Yekrop a humanitarian visa, the Government of Australia recognized his refugee status and the fact that any return to South Sudan would constitute refoulement.

9. The source reports that when Mr. Yekrop and his family arrived in Australia, he was excited about his new life and had plans for his future. He wanted to learn English, get educated and work. He reportedly commenced intensive English classes and completed year 12. On arrival in Australia, it was the first time in Mr. Yekrop's life that he had felt safe. He felt that he could relax for the first time and would no longer have to be afraid and cautious all the time.

10. However, although Mr. Yekrop was finally physically safe in Australia, his underlying psychological issues were not addressed. On arrival in Australia, he received no counselling or other support to deal with his traumatic past.

11. Within six months of arriving in Australia, Mr. Yekrop reportedly began self-medicating with drugs and alcohol,[1] and on 25 April 2004, he was convicted of low-level property damage. Thereafter, he was convicted of numerous offences relating to property damage, drink-driving, dangerous driving, violence and miscellaneous other offences. The

[1] The source refers to several reports that illustrate the problems experienced by refugees from South Sudan in settling into their new lives in a safe environment. These problems include alcohol and other substance abuse and mental health issues. These factors reportedly apply to Mr. Yekrop.

source notes that Mr. Yekrop was convicted of a number of offences while he was still a minor. He has reportedly served prison sentences as a result of these convictions.

12. According to the source, on 9 August 2011, Mr. Yekrop received notice of the intention of the Department of Immigration and Border Protection to consider cancellation of his global special humanitarian (subclass 202) visa. The Department cancelled Mr. Yekrop's visa on 24 May 2013, owing to concerns about his character, but giving him the right to apply for revocation of cancellation. The source indicates that under section 501 of the Australian Migration Act 1958, the Minister of Immigration and Border Protection may cancel a person's visa if the Minister believes that the person does not meet the character requirements as set out in that section. Due to Mr. Yekrop's criminal history, the Minister determined that he did not meet such character requirements.

13. The source reports that on 22 January 2014, following the cancellation of his humanitarian visa, Mr. Yekrop applied for a protection (class XA) visa.

Arrest and detention

14. According to the source, on 1 May 2014, Mr. Yekrop was detained by officials from the Department of Immigration and Border Protection, following the completion of his last prison sentence upon his release from prison. He was initially administratively detained at Villawood Immigration Detention Centre and he has since been moved to Christmas Island Immigration Detention Centre, where he remains to date.

15. On 31 May 2014, Mr. Yekrop's protection visa application of 22 January 2014 was refused by the Department of Immigration and Border Protection. He appealed the refusal before the Refugee Review Tribunal. On 30 September 2014, the Tribunal remitted the refusal to the Department, with the recommendation that Mr. Yekrop met the definition of a refugee as a member of a particular social group (returnees and people with mental health disorders). On 23 October 2014, the cancellation of Mr. Yekrop's humanitarian visa was confirmed.

16. On 3 February 2015, the Department of Immigration and Border Protection sent notice of the intention to consider refusal of a protection visa. On 5 August 2016, the Minister again refused to grant Mr. Yekrop a protection (class XA) visa, due to character concerns. On 15 August 2016, Mr. Yekrop appealed that second rejection of his protection visa application to the Administrative Appeals Tribunal, and on 31 October 2016, the Tribunal upheld the Minister's decision not to grant Mr. Yekrop a protection visa. On 17 August 2016, the Full Federal Court of Australia upheld the cancellation of Mr. Yekrop's humanitarian visa.

17. The source indicates that Mr. Yekrop is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

18. According to the source, Australian law thus provides that a non-citizen can be released from administrative detention only if they are removed from Australia or granted a visa. However, the source notes that Mr. Yekrop is not eligible to apply for any other type of visa.

19. The source also notes that given that Mr. Yekrop has previously been recognized as a refugee by the Department of Immigration and Border Protection, and given the current emergency situation in South Sudan, he cannot be removed from Australia without it constituting refoulement. Furthermore, as noted above, both the Department and the Minister have refused to grant Mr. Yekrop a visa.

20. The source further notes that it is unclear whether South Sudan would accept Mr. Yekrop as a citizen. He left the Sudan before South Sudan was an independent country. South Sudan would reportedly first have to grant Mr. Yekrop citizenship before he could be returned to the country. Given the current humanitarian crisis in South Sudan, it is unlikely that South Sudan would process such a citizenship request, particularly if the request would

result in the return of a person to South Sudan and thus place further pressure on the already strained resources of that country.

21. In addition, the source notes that it is unlikely, given that Mr. Yekrop is a Dinka man and the son of a Sudan People's Liberation Army soldier that the Sudan would accept him back. According to the source, it is thus extremely unlikely that Mr. Yekrop could be returned to the Sudan or South Sudan.

Analysis of violations

22. The source asserts that Mr. Yekrop's detention constitutes an arbitrary deprivation of his liberty under categories II, III, IV and V of the categories applicable to the consideration of cases by the Working Group.

Category II

23. The source submits that Mr. Yekrop has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. Mr. Yekrop came to Australia as a refugee in exercise of his right to seek and enjoy asylum. Had he not travelled to Australia to seek asylum, Mr. Yekrop would not currently be detained.

24. According to the source, Mr. Yekrop has also been deprived of his liberty in contravention of article 26 of the International Covenant on Civil and Political Rights. As a non-Australian citizen, Mr. Yekrop is subject to administrative detention, whereas Australian citizens in the same position as Mr. Yekrop, namely those who have served custodial sentences, are not subject to administrative detention following the completion of their criminal sentence.

Category III

25. The source submits that the international norms relating to the right to a fair trial have not been observed in relation to Mr. Yekrop's detention, specifically the rights protected under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant.

26. The source notes that the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, requires that detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time (para. 18).

27. Nevertheless, the source highlights the fact that Mr. Yekrop has been held in administrative detention for more than three years. The Government of Australia and the Department of Immigration and Border Protection, by granting Mr. Yekrop a humanitarian visa, recognized him as a person who engages the country's protection obligations. South Sudan is currently experiencing a period of humanitarian emergency. As such, even if he was a citizen of South Sudan (which he is not), any return of Mr. Yekrop to South Sudan would constitute refoulement.

28. The source thus submits that unless Mr. Yekrop is released from administrative detention, he will be in detention indefinitely. Given that he cannot return to South Sudan, his detention is not reasonable. Furthermore, he has reportedly participated in a variety of rehabilitation and counselling programmes. The source thus argues that Mr. Yekrop no longer represents a threat to the Australian community, and his detention is not necessary or proportionate. According to the source, there is no evidence that the Department of Immigration and Border Protection has reassessed Mr. Yekrop's detention as it extends in time.

Category IV

29. The source submits that Mr. Yekrop, as a recognized refugee who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

30. As mentioned above (see para. 17), the Australian Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

31. In this regard, the source notes that the High Court of Australia, in its 2004 decision on *Al-Kateb v. Godwin*, upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source also notes that, in its decision in *Mr. C. v. Australia*, the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia (see CCPR/C/76/D/900/1999, para. 7.4). The source submits that Mr. Yekrop therefore lacks any chance of his detention being the subject of a real administrative or judicial review remedy.

Category V

32. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that while Australian citizens can challenge administrative detention, non-citizens cannot.

Response from the Government

33. On 22 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 21 February 2018, detailed information about the current situation of Mr. Yekrop and any comments on the source's allegations.

34. In its reply of 21 February 2018, the Government of Australia reiterated that it takes its protection obligations very seriously, and its protection arrangements are premised on the fundamental obligation of non-refoulement.

35. In relation to the specific case, the Government confirms that Mr. Yekrop arrived in Australia on 10 October 2003 as the holder of a global special humanitarian visa (subclass 202) as a dependant on his mother's visa. The Government notes that since his arrival, Mr. Yekrop has received over 40 convictions for a range of offences, including destroying or damaging property, drink-driving, driving vehicles without a licence, larceny and common assault.

36. It was due to Mr. Yekrop's criminal convictions that the Department of Home Affairs considered cancelling his visa on two separate occasions. On 31 May 2007 and 12 January 2010, Mr. Yekrop was advised that his visa would not be cancelled and he was issued with a warning letter on both occasions, indicating that any future criminal conduct could result in his visa being cancelled.

37. Following further criminal convictions, Mr. Yekrop's visa was indeed cancelled on 8 November 2012 under section 501 of the Australian Migration Act. On 6 May 2013, Mr. Yekrop sought review of the decision to cancel his visa at the Administrative Appeals Tribunal, but since this application was lodged outside the required time frame, the Tribunal found that it had no jurisdiction to review the decision. As Mr. Yekrop was released from prison on 1 May 2014, he was detained under section 189 of the Act and transferred to an immigration detention facility. He has remained in immigration detention since then.

38. On 22 January 2014, Mr. Yekrop lodged a protection visa (subclass 866) application. On 31 May 2014, he was found not to engage the protection obligations of Australia, and the Department of Home Affairs refused his protection visa application. Further to this, Mr. Yekrop sought review of the refusal decision at the Refugee Review Tribunal on 4 July 2014, and on 1 October 2014, the Tribunal remitted the case to the Department of Home Affairs with the direction that Mr. Yekrop was found to engage the protection obligations of Australia.

39. On 3 July 2014, Mr. Yekrop lodged an application for a bridging visa (subclass 050), which was deemed invalid on 7 July 2014 since he had previously had a visa cancelled under section 501 of the Australian Migration Act.

40. According to the Government, on 8 October 2014, Mr. Yekrop's protection visa application was referred for refusal consideration under section 501 of the Act and he was issued with a notice of intent to consider refusal on 3 February 2015. Following consideration of Mr. Yekrop's case, the Department of Home Affairs refused his protection visa application under section 501 of the Act on 5 August 2016. On 15 August 2016, Mr. Yekrop sought review of the decision to refuse his protection visa application at the Administrative Appeals Tribunal, which affirmed the decision on 31 October 2016.

41. On 28 February 2017, the Department of Home Affairs commenced an assessment of Mr. Yekrop's case against the section 195A ministerial intervention guidelines for possible referral to the Minister. On 24 October 2017, his case was found not to meet the guidelines for referral due to his criminal history, a visa cancelled under section 501 of the Australian Migration Act and another visa refused under section 501 of the Act. On the same day, the Department of Home Affairs commenced an International Treaties Obligations Assessment to consider the ongoing non-refoulement obligations of Australia in relation to Mr. Yekrop, which is still under way.

42. The Government confirms that Mr. Yekrop is not eligible to apply for any other type of visa and that he remains in detention as an unlawful non-citizen. The Government objects to the submission that Mr. Yekrop has not been granted the possibility of administrative or judicial review or remedy and notes that he was able to seek merit and judicial review of the decision to cancel his global special humanitarian visa (subclass 202) and to refuse his protection visa application. While Mr. Yekrop did seek this in relation to his global special humanitarian visa, he did so outside the prescribed time limit. His application to review the decision to refuse his protection visa was unsuccessful. The Government, however, points out that Mr. Yekrop did not seek judicial review of either of those decisions, which he could have done before the Federal Court of the High Court of Australia.

43. The Government also rejects the submissions made by the source in relation to the effect of the 2004 decision of the High Court in *Al-Kateb v. Godwin* and points out that actions such as habeas corpus remain available to all citizens and non-citizens.

44. Furthermore, the Government underlines that Mr. Yekrop's detention has been reviewed on 37 occasions under case management processes by the Case Management and Detention Review Committee meetings. The outcomes of those reviews found that Mr. Yekrop's detention continues to be appropriate and that his current placement is suitable.

Further information from the source

45. On 21 February 2018, the reply of the Government was sent to the source for its comments. In its response of 6 March 2018, the source rejects the possibility of habeas corpus in the case of Mr. Yekrop. Noting that Mr. Yekrop arrived in Australia on the basis of a visa which was subsequently withdrawn, Mr. Yekrop's detention complies with the national legislation of Australia, which thus renders a habeas corpus application useless as it applies to alleged instances of unlawful detention.

46. The source points out that, according to its Smart Traveller website, the Government of Australia is advising that no one should travel to South Sudan.[2] The source also refers to the most recent Administrative Appeals Tribunal decision of 6 March 2018 in relation to South Sudan, in which the Tribunal decided that South Sudan was unsafe for anyone to return to.[3]

[2] http://smartraveller.gov.au/Countries/africa/east/Pages/south_sudan.aspx.

[3] See Jayba and Minister for Immigration and Border Protection (Migration) [2018] AATA 385, Administrative Appeals Tribunal of Australia, 6 March 2018.

47. The source agrees with the Government's point that Mr. Yekrop has been able to seek merits and judicial review of the decisions to cancel his visa and to refuse his protection visa application. However, according to the source, those reviews relate to visa processes, and not to the detention itself. The source reiterates that Mr. Yekrop's detention is legal in Australia, but it is nevertheless arbitrary, especially as it extends in time.

Discussion

48. The Working Group thanks both the source and the Government for their engagement in this case and for the extensive comments provided, which have assisted it in reaching its conclusions.

49. The source has submitted that Mr. Yekrop's detention is arbitrary and falls under categories II, III, IV and V. While not addressing the categories as applied by the Working Group specifically, the Government of Australia rejects those submissions. The Working Group has examined them in turn.

50. The source submits that Mr. Yekrop has been deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. Mr. Yekrop came to Australia as a refugee in exercise of his right to seek and enjoy asylum and had he not travelled to Australia to seek asylum, Mr. Yekrop would not currently be detained.

51. The Working Group observes that Mr. Yekrop arrived in Australia on 10 October 2003 as the holder of a global special humanitarian visa (subclass 202) as a dependant on his mother's visa and that he has lived in Australia ever since. The Working Group also observes that he received this particular visa following an assessment that his case engages the international protection responsibility of Australia; and that upon his arrival he was not detained but was free to live in the community. These are all points which are not contested by either the source or the Government.

52. The Working Group notes that since his arrival in Australia, Mr. Yekrop has had some 40 criminal convictions and that due to his criminal convictions, the Department of Home Affairs considered cancelling his visa on two separate occasions. On 31 May 2007 and 12 January 2010, Mr. Yekrop was advised that his visa would be cancelled and he was issued with a warning letter on both occasions, indicating that any future criminal conduct could result in his visa being cancelled. Following further criminal convictions, Mr. Yekrop's visa was indeed cancelled on 8 November 2012 under section 501 of the 1958 Australian Migration Act. Mr. Yekrop was placed in administrative detention upon being released from prison on 1 May 2014 and has been in immigration detention ever since. These are also points which are not contested by either the source or the Government.

53. The Working Group observes that the cancellation of Mr. Yekrop's visa resulted from an adverse character assessment, which in turn resulted from the sheer number of criminal convictions. The cancellation of his visa was the reason why he was detained as an unlawful non-citizen. On the basis of these facts, the Working Group is unable to agree with the source that Mr. Yekrop's detention resulted from his legitimate exercise of the right to seek asylum as provided in article 14 of the Universal Declaration of Human Rights. On the contrary, it is clear to the Working Group that Mr. Yekrop was able to exercise his right to seek asylum: he arrived in Australia and was permitted to live as freely as everyone else in the country until he came into conflict with law. The Working Group therefore concludes that the detention of Mr. Yekrop does not fall under category II.

54. The source has also submitted that the international norms relating to the right to a fair trial have not been observed in relation to Mr. Yekrop's detention and that his detention therefore falls under category III. The source notes that Mr. Yekrop has been held in administrative detention for more than three years. The source argues that Mr. Yekrop no longer represents a threat to the Australian community, and his detention is not necessary or proportionate. According to the source, there is no evidence that the Department of Immigration and Border Protection has reassessed Mr. Yekrop's detention as it extends in time.

55. The source also argues that Mr. Yekrop's detention is arbitrary and falls under category IV since, as a recognized refugee who is subject to prolonged administrative custody, he has not been guaranteed the possibility of administrative or judicial review or remedy. The source notes that the Australian Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention, unless the person has been granted a visa.

56. In this regard, the source notes that the High Court of Australia, in its decision on *Al-Kateb v. Godwin*, upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source also notes that, in its decision in *Mr. C. v. Australia*, the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia, and that Mr. Yekrop therefore lacks any chance of his detention being the subject of a real administrative or judicial review remedy.

57. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[4] This right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,[5] and it applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[6] Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[7]

58. The Working Group observes that the facts of Mr. Yekrop's case as presented to it by both the source and the Government are characterized by various appearances by him before courts, pursuing his visa applications and challenging their rejection. However, none of these appearances have concerned his need to remain in detention while his visa applications are being considered and no judicial body has ever been involved in the assessment of the legality of Mr. Yekrop's detention, which would necessarily involve the assessment of the legitimacy, need and proportionality to detain.[8]

59. In other words, throughout his four years of detention, Mr. Yekrop has been unable to challenge the legality of his detention per se. The only body that appears to have been reviewing the need for Mr. Yekrop to remain in detention is the Case Management and Detention Review Committee. However, the Working Group observes that this is not a judicial body. Moreover, the Working Group observes the failure on behalf of the Government to explain how the reviews carried out by that Committee have satisfied the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.

60. The Working Group also recalls the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[9]

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[4] See A/HRC/30/37, paras. 2–3.

[5] Ibid., para. 11.

[6] Ibid., annex, para. 47 (a).

[7] Ibid., annex, para. 47 (b).

[8] See the Working Group's revised deliberation No. 5 on deprivation of liberty of migrants, paras. 12–13.

[9] See *Mr. C. v. Australia*; *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPk/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004); *Bakhtiyari et al. v. Australia*

61. In addition, as the Working Group stated in its revised deliberation No. 5 on deprivation of liberty of migrants, detention in the migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[10] The Working Group notes that the Government has not provided any details on the alternatives to detention that the Case Management and Detention Review Committee or any other body have considered in the case of Mr. Yekrop and therefore must conclude that these were not considered, which is a further breach of article 9 (1) of the Covenant.

62. The Working Group thus concludes that Mr. Yekrop has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling under category IV and not category III as submitted by the source.

63. The source has further submitted that the detention of Mr. Yekrop falls under category V since Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that while Australian citizens can challenge administrative detention, non-citizens cannot. The Government rejects this submission made by the source and points out that actions such as habeas corpus remain available to all citizens and non-citizens.

64. The Working Group is surprised by the Government's submission that actions such as habeas corpus are a possible avenue of redress for Mr. Yekrop. It is clear to the Working Group that the current Australian legislation does permit the detention of Mr. Yekrop and therefore the habeas corpus challenge, which is aimed at challenging illegal detention, does not provide a realistic avenue of redress for people in Mr. Yekrop's situation. However, the Working Group recalls that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

65. The Working Group notes the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[11] The Working Group also notes that the effect of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin* is such that non-citizens have no effective remedy against their continued administrative detention.

66. The Working Group specifically notes the decision of the Human Rights Committee in paragraph 9.3 of *F.J. et al. v. Australia*. In that case, the Committee examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment is such that there is no effective remedy to challenge the legality of continued administrative detention.

67. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[12] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Yekrop is arbitrary, falling under category V.

68. The Working Group is deeply concerned that Mr. Yekrop has been in detention for four years now. The Government itself acknowledges that he is not eligible for any other type of visa, and he thus faces the real prospect of indefinite detention given that the only

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(CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[10] See A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; A/HRC/30/36/Add.1, para. 81; and opinion No. 72/2017.

[11] See *C. v. Australia*; *Baban and Baban v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004); *Bakhtiyari et al. v. Australia*; *D and E and their two children v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*.

[12] See opinions No. 28/2017, No. 42/2017, No. 71/2017 and No. 21/2018.

other possibility for him currently is deportation, which is likely to engage the responsibility of Australia under the prohibition against refoulement.

69. The Working Group has repeatedly pointed out that detention of asylum seekers must never be unlimited or of excessive length, that a maximum period should be imperatively provided by law and that indefinite detention is arbitrary.[13] The Working Group once again emphasizes that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

70. Lastly, the Working Group notes with concern that the present case is among several cases concerning immigration detention in Australia that have come before it during the past year.[14] All of those cases address the mandatory immigration detention policy and, in all cases, the Working Group has found the detention to be arbitrary.

Disposition

71. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of William Yekrop, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories IV and V.

72. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Yekrop without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

73. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Yekrop immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

74. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Yekrop and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

75. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Yekrop has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Yekrop;

(c) Whether an investigation has been conducted into the violation of Mr. Yekrop's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

76. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

[13] See opinions No. 5/2009, No. 42/2017 and No. 71/2017; revised deliberation No. 5, paras. 25–26; and A/HRC/13/30, para. 61.

[14] See opinions No. 21/2018, No. 71/2017, No. 42/2017 and No. 28/2017.

whether further technical assistance is required, for example, through a visit by the Working Group.

77. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

78. The Government should disseminate through all available means the present opinion among all stakeholders.

79. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 20 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 21/2018 concerning Ghasem Hamedani (Australia)[1]

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 1 February 2018 the Working Group transmitted to the Government of Australia a communication concerning Ghasem Hamedani. The Government replied to the communication on 3 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

[1] In accordance with rule 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Hamedani, born in 1973, is an Iranian national. He usually resides at the Villawood Immigration Detention Centre in New South Wales, Australia.

5. The source reports that Mr. Hamedani is a former intelligence officer who fled the Islamic Republic of Iran in the context of being court martialled and persecuted, following his refusal to support the regime of Bashar al-Assad in the Syrian Arab Republic. He is reported to have suffered significant torture and trauma.

Arrest and detention

6. According to the source, Mr. Hamedani arrived on Christmas Island, Australia, by boat on 5 August 2013 in order to seek asylum. He was immediately detained by officials from the Department of Immigration and Border Protection. The source reports that all persons arriving by boat are issued with a type of warrant issued by the Department, but no documents are currently available.

7. The source submits that, on 19 July 2013, the Government of Australia declared a new policy that all persons seeking asylum and arriving by boat would be transferred to a regional processing centre and would not be permitted to engage the protection obligations of Australia. On or about 5 August 2013, Mr. Hamedani was therefore transferred to Manus Island, Papua New Guinea, where he was placed in administrative detention. The source also submits that Mr. Hamedani has been recognized as a refugee by the Government of Papua New Guinea since March 2015.

8. On 5 August 2016, Mr. Hamedani was reportedly transferred to Australia for medical treatment. In that respect, the source notes that he has been diagnosed with a range of mental health disorders, including post-traumatic stress disorder. However, he has now been in closed administrative detention for a period of approximately four and a half years and continues to be detained at the Villawood Immigration Detention Centre.

9. According to the source, Mr. Hamedani is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1), 196 (1) and 196 (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

Legal analysis

10. The source submits that the detention of Mr. Hamedani constitutes an arbitrary deprivation of his liberty, falling under categories II, IV and V.

11. The source considers that Mr. Hamedani has been deprived of liberty as a result of the exercise of his right guaranteed by article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. The source thus submits that the detention of Mr. Hamedani constitutes an arbitrary deprivation of his liberty, falling under category II.

12. The source also submits that Mr. Hamedani, as a refugee, who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

13. With regard to sections 189 (1), 196 (1) and 196 (3) of the Migration Act, the source highlights that, in the case of Mr. Hamedani, removal or deportation would constitute refoulement, and he is ineligible for a visa in Australia as he has been included in the regional processing arrangement between Australia and Papua New Guinea. In that respect,

the source asserts that, under international law, Australia was responsible for Mr. Hamedani's transfer to and detention on Manus Island.

14. The source notes that the High Court of Australia upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia.[2] The source also notes that the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia.[3] As such, there is little chance that Mr. Hamedani's detention will be the subject of a real administrative or judicial review or remedy. His detention thus constitutes an arbitrary deprivation of liberty, falling under category IV.

15. Furthermore, the source submits that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that, while Australian citizens can challenge administrative detention, non-citizens cannot. The detention of Mr. Hamedani thus constitutes an arbitrary deprivation of his liberty, falling under category V.

16. The source underlines that Mr. Hamedani has exhausted all domestic remedies to secure his release into the Australian community. Due to the fact that Mr. Hamedani has been included in the regional processing arrangement with Papua New Guinea, his domestic remedies are reportedly extremely limited. Indeed, the only domestic remedy is for Mr. Hamedani to appeal to the Minister for Immigration and Border Protection to be granted a community detention placement under the Migration Act. It is understood by the source that, in May 2017, the Department of Immigration and Border Protection generated such an application in order to place Mr. Hamedani in community detention. However, several months later, no response has reportedly been received and Mr. Hamedani remains in detention.

17. In that respect, the source notes that some community detention applications are processed within two weeks. The source states that it is obviously possible for the Government of Australia to deal with community detention placement requests in a short period of time. No explanation has reportedly been given for the delay in processing Mr. Hamedani's application.

Response from the Government

18. On 1 February 2018, the Working Group transmitted the allegations from the source to the Government of Australia under its regular communications procedure. The Working Group requested the Government to provide, by 3 April 2018, detailed information about the current situation of Mr. Hamedani and any comments on the source's allegations.

19. In its reply of 3 April 2018, the Government explains that its border protection policies aim to disrupt and deter people from engaging people smugglers and attempting dangerous journeys to Australia by boat. Its policies were implemented in response to a dramatic increase in the number of people attempting illegal migration to Australia by boat between 2008 and 2013.

20. The Government notes that under its current border protection policy, illegal maritime arrivals — referred to in the Migration Act as unauthorized maritime arrivals — will be returned to their departure points or homes, or transferred to a regional processing country and will thus not settle permanently in Australia. According to the Government, those policies have succeeded in stemming the flow of boats, disrupting the people-smuggling business model and preventing loss of life at sea.

21. Consistent with the Migration Act, illegal maritime arrivals who arrived in Australia after 13 August 2012 have been taken to a regional processing country, either Papua New Guinea or Nauru, to assess their protection claims. The position of the Government is that it has not and does not exercise effective control over persons taken to Papua New Guinea under regional processing arrangements.

[2] See decision in *Al-Kateb v. Godwin* (2004) 219 CLR 562.

[3] See *C. v. Australia* (CCPR/C/76/D/900/1999).

22. According to the Government of Australia, the former Manus Regional Processing Centre was a matter for the Government of Papua New Guinea as it was located within that country's sovereign territory and was managed and administered under its domestic law and in accordance with its international legal obligations. Once the transferees were in Papua New Guinea, which is relevantly a party to the Convention relating to the Status of Refugees and the Covenant, the obligations of Papua New Guinea under those international instruments were engaged.

23. The Government notes that it supports the Governments of Papua New Guinea and Nauru to meet the health needs of persons transferred there. Some individuals have presented health issues that require medical treatment not available in a regional processing country. Some of those individuals, including Mr. Hamedani, have been transferred to Australia as transitory persons for the temporary purpose of medical treatment. In some cases, family or other support persons have accompanied the person receiving treatment (also transitory persons). The Migration Act requires that transitory persons be returned to a regional processing country as soon as reasonably practicable when they no longer need to be in Australia for the temporary purpose for which they were transferred.

24. The Government also notes that persons brought to Australia for a temporary purpose are unlawful non-citizens under the Migration Act and must be detained unless subject to a residence determination, which is often referred to as community detention. The Minister for Immigration and Border Protection may make a residence determination where he considers it is in the public interest to do so.

25. The Minister's power to make a residence determination is reportedly personal, discretionary and non-compellable. The Minister does not have a duty to, and is not legally bound to, exercise or consider exercising any of his powers. The Minister has approved guidelines on his residence determination powers. A departmental officer will make an assessment as to whether the specified person meets the approved guidelines and, where the guidelines are met, refer the specified person to the Minister for consideration of the exercise of his public interest power.

26. The Government further explains that detention under the Migration Act is administrative in nature and not for punitive purposes. The Government is committed to ensuring that all people in administrative immigration detention are treated in a manner consistent with the international legal obligations of Australia.

27. The Government claims that both Australian citizens and non-citizens are able to challenge the lawfulness of their detention in a court, through actions such as habeas corpus. The basis on which a court may order release depends on the type of detention. As it is not lawful to detain a citizen or a lawful non-citizen in immigration detention under the Migration Act, a citizen or a lawful non-citizen would be released immediately if they were detained in immigration detention by mistake. Other forms of administrative detention (other than immigration detention), and the ability to challenge them, do not depend on a person's immigration status.

28. According to the legislative framework of Australia, the length of immigration detention is not limited by a set time frame but is dependent upon a number of factors, including identity determination, developments in country information and the complexity of processing due to individual circumstances relating to health, character or security matters. Relevant assessments are completed as expeditiously as possible to facilitate the shortest possible time frame for detaining people in immigration detention facilities.

29. The Government's position is that the immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary per se under international law. Continuing detention may become arbitrary after a certain period without proper justification. Detention is reportedly a last resort for the management of unlawful non-citizens.

30. According to the Government, the case management practices of Australia ensure that any person who is detained understands the reason for their detention and the choices and pathways that may be available to them, including choosing to return to their country of origin or deciding whether to pursue legal remedies.

31. The immigration detention system is also subject to regular scrutiny, including visits, by external agencies such as the Commonwealth Immigration Ombudsman, the Australian Human Rights Commission and the Office of the United Nations High Commissioner for Refugees (UNHCR) to ensure that people in immigration detention are treated humanely, decently and fairly.

32. Against that background, the Government explains that Mr. Hamedani arrived on Christmas Island as an undocumented illegal maritime arrival on 31 July 2013 and, at the time of his arrival, he was reasonably suspected to be an unlawful non-citizen and did not hold a visa to enter Australia. Under section 189 (3) of the Migration Act, if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

33. On 2 September 2013, Mr. Hamedani was transferred to the Manus Regional Processing Centre under section 198AD of the Migration Act. As he arrived into Australia after 19 July 2013, he was subject to mandatory regional processing.

34. On 5 August 2016, Mr. Hamedani was reportedly brought to Australia for medical treatment and detained under section 189 (1) of the Migration Act. He was subsequently transferred to Concord Hospital the same day for medical treatment.

35. On 15 August 2016, Mr. Hamedani was discharged from hospital and transferred to the Villawood Immigration Detention Centre.

36. On 17 September 2016, Mr. Hamedani was reportedly found to be a refugee under the Papua New Guinea Refugee Status Assessment process.

37. The Government explains that, on 10 November 2016, Mr. Hamedani's case was referred internally within the Department of Immigration and Border Protection for consideration against the Minister's guidelines for the exercise of his residence determination power under section 197AB of the Migration Act (a residence determination). On 23 February 2017, Mr. Hamedani was found not to meet the guidelines for referral to the Minister.

38. On 15 May 2017, Mr. Hamedani's case was again referred internally for consideration against the Minister's guidelines for residence determination referrals. Mr. Hamedani was found to meet the guidelines, and, on 13 June 2017, a submission for residence determination under section 197AB of the Migration Act was sent to the Minister. As referenced above, the Minister's power to make a residence determination is personal, discretionary and non-compellable. To date, no decision has been made on Mr. Hamedani's residence determination.

39. According to the Government, Mr. Hamedani has a mental health condition and a history of self-harm. In February 2018, he underwent a psychiatric review and was noted to be at moderate risk of self-harm and deterioration in his mental health.

40. As the Minister has not made a residence determination, Mr. Hamedani currently remains in immigration detention at the Villawood Immigration Detention Centre. As Mr. Hamedani arrived to Australia as an illegal maritime arrival and has not been cleared for immigration, he is barred from lodging any visa applications in Australia under section 46 of the Migration Act.

41. The Government rejects claims made by the source that Mr. Hamedani has not been guaranteed the possibility of administrative or judicial review or remedy of his ongoing detention. According to the Government, a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia. Section 75 (v) of the Australian Constitution provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

42. The Government also rejects further claims made by the source that, as a result of the decision of the High Court in *Al-Kateb v. Godwin*, non-citizens are not equal before the courts. In that instance, the High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

43. The Government reiterates that both Australian citizens and non-citizens are able to challenge the lawfulness of their detention in a court, through actions such as habeas corpus, as referred to above in paragraph 27.

44. The Government also rejects claims by the source that the removal of Mr. Hamedani, as a person recognized by Papua New Guinea as a refugee would constitute refoulement. The Government of Australia takes its protection obligations seriously, and its protection arrangements are premised on the fundamental obligation of non-refoulement.

45. The Government explains that since Mr. Hamedani remains an unauthorized maritime arrival for the purposes of the Migration Act, section 198AD and section 198AH require that he be taken to a regional processing country as soon as reasonably practicable when it is determined that the temporary purpose for which he was brought to Australia no longer applies.

46. In relation to the discretionary power of the Minister, the Government explains that the Minister has a discretion under section 198AE of the Migration Act to determine that it is in the public interest that an illegal maritime arrival not be taken to a regional processing country. This discretion is non-compellable and non-delegable. The Minister has approved guidelines on his discretion under section 198AE of the Migration Act. A departmental officer will make an assessment as to whether the specified person meets the approved guidelines and, where the guidelines are met, refer the specified person to the Minister for consideration of the exercise of his public interest power. These guidelines address where an illegal maritime arrival has made credible claims that he or she faces a threat to his or her life or freedom on the basis of race, religion, nationality, membership of a particular social group or political opinion, or face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the death penalty if returned to the regional processing country.

47. The Government also rejects allegations by the source that, with regard to sections 189 (1), 196 (1) and 196 (3) of the Migration Act, removal or deportation would constitute refoulement. Mr. Hamedani is an unlawful non-citizen and is required under section 196 of the Act to be detained until he is removed from Australia under section 198 or 199 of the Act, dealt with for the purposes of being taken to a regional processing country, deported under section 200 of the Act or granted a visa.

48. The Government explains that, as a transitory person brought to Australia for a temporary purpose, Mr. Hamedani must be removed from Australia as soon as reasonably practicable after he no longer needs to be in Australia for that purpose. The Government has never indicated that it intended to take him to any place except back to a regional processing country. The Government has maintained that it will return Mr. Hamedani to a regional processing country once the temporary purpose for which he came to Australia ceases.

Further comments from the source

49. On 3 April 2018, the response from the Government was sent to the source for further comments. In its response of 9 April 2018, the source rejects what it views as the essence of the reply provided by the Government of Australia, namely that, because open-ended detention (subject to certain events, discussed below) is lawful in Australia, such detention is either not arbitrary or otherwise complies with the State party's international obligations. The source submits that, in its submission to the Working Group, the Government acknowledges that Mr. Hamedani, as an unlawful non-citizen, is lawfully detained under Australian law. The source however also submits that such lawful (under Australian law) detention is arbitrary and open-ended (or worse, indefinite).

50. Furthermore, the source underlines that, by the Government's own admission, the purpose of the State party's border protection policies, which includes administrative detention, is not tailored to the individual circumstances of a particular asylum seeker or refugee. Instead, the purpose of offshore detention and indefinite detention (or detention for an indeterminate amount of time) is to provide deterrence to others. If administrative detention is not for the stated statutory purposes (i.e., visa processing or removal, under the Migration Act), then it ceases to have a basis in the Act and becomes punitive. The source

notes that this is also contrary to the constitutional separation of powers between the judiciary and executive.

51. The source rejects that habeas corpus challenge is a possible option for Mr. Hamedani. Since his detention is lawful under Australian law, habeas corpus challenge is not applicable as this is for instances of unlawful detention.

52. The source further objects to the submission made by the Government stating that detention is used as a last resort for the management of unlawful non-citizens. According to the source, this is not correct, as under sections 189 (1) and 189 (3) of the Migration Act, an unlawful non-citizen must be detained. This is thus a mandatory requirement for which an individual departmental officer cannot exercise any discretion.

53. In relation to the Government's discussion of *Al-Kateb v. Godwin*, the source reiterates that the basic premise is that the administrative detention of non-citizens, as opposed to citizens, is lawful and the cited case thus reinforces the position of Mr. Hamedani, i.e. that his arbitrary open-ended detention is authorized under Australian law (by legislation and case law).

Discussion

54. The Working Group wishes to thank both the source and the Government for their engagement in the present case and the extensive comments provided, which will assist the Working Group in reaching its conclusions in the case.

55. The Working Group observes that, in its reply, the Government of Australia maintains that its responsibility cannot be implicated in the present case as it holds no effective control over the Manus Regional Processing Centre, which is where Mr. Hamedani has been held for most of his detention. Since this is a fundamental issue to the present case, the Working Group shall examine it first.

56. The Working Group observes that Mr. Hamedani arrived by boat on Christmas Island. The source submits that this was on 5 August 2013 while the Government has submitted that it was on 31 July 2013.

57. According to the Government, Mr. Hamedani was transferred to the Manus Regional Processing Centre on 2 September 2013. The Government has not provided any explanation as to what happened to Mr. Hamedani during the month between his initial detention and his transfer. The Working Group therefore presumes that during that time he was in the custody of the Australian authorities.

58. Mr. Hamedani's transfer on 2 September 2013 was based on the agreement between Papua New Guinea and Australia concerning the processing of asylum claims. The Working Group observes that the Government of Australia has submitted that Papua New Guinea exercises exclusive effective control over persons taken there under the regional processing arrangements, as was the case of Mr. Hamedani.

59. However, the Australian authorities initially detained Mr. Hamedani on the sovereign territory of Australia, where he was held in custody for a period of at least one month. Therefore, the decision to detain him was made on Australian soil, by the Australian authorities, as was the decision to transfer him to the Manus Regional Processing Centre. The Working Group therefore rejects any submissions that the responsibility of the Australian authorities is not implicated in the initial detention of Mr. Hamedani or in the decision to transfer him to the Centre.

60. Furthermore, in relation to the time that Mr. Hamedani spent in the Manus Regional Processing Centre, the Working Group observes that the Government of Australia in its reply claims that its responsibility cannot be implicated as it holds no effective control over the facility.

61. However, the Working Group observes that UNHCR has stated that asylum seekers and refugees should ordinarily be processed in the territory of the State where they arrive,

or which otherwise has jurisdiction over them. Furthermore, all cooperation arrangements should build on and strengthen national asylum systems, not undermine or deflect responsibilities onto other States.[4]

62. The Working Group further notes the findings of UNHCR following its monitoring visits conducted to the Manus Regional Processing Centre, including during the time when Mr. Hamedani was there. In its report on the monitoring visit to Manus Island, Papua New Guinea on 23 to 25 October 2013, UNHCR concluded:

> UNHCR maintains its position that the physical transfer of asylum seekers from Australia to Papua New Guinea, as an arrangement agreed by two [States parties of the Convention relating to the Status of Refugees], does not extinguish the legal responsibility of Australia for the protection of the asylum-seekers affected by the transfer arrangements. In short, both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the … Convention and other applicable international instruments.[5]

63. This position is in line with that of the Working Group, which is explained in its revised deliberation No. 5 on the deprivation of liberty of migrants: when a State maintains migration detention facilities in the territory of another State, both States remain jointly responsible for the detention. The Working Group therefore considers that the Government of Australia remains responsible for the detention of Mr. Hamedani since his detention on 31 July 2013.

64. The Working Group will now consider the allegations made by the source that the detention of Mr. Hamedani was arbitrary and falls under categories II, IV and V and shall examine these in turn.

65. The source has alleged that the detention of Mr. Hamedani is arbitrary and falls under category II as he was detained while exercising the right to seek asylum. The Government of Australia has rejected these claims, noting that Mr. Hamedani was detained as an unlawful non-citizen as he did not have a valid visa upon his arrival in Australia.

66. The source has submitted that Mr. Hamedani arrived on Christmas Island to seek asylum while the Government has asserted that he arrived as an unlawful non-citizen. Upon his arrival, he was immediately detained by the Australian authorities. The Working Group notes that the Government of Australia does not dispute this fact but explains that if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain that person, noting that this is precisely was happened to Mr. Hamedani.

67. The Working Group observes, however that anyone seeking asylum is likely to arrive without a valid visa and reiterates[6] that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees, and its Protocol. The Working Group notes that those instruments constitute international legal obligations undertaken by Australia.

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[4] See UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013, para. 15. Available at http://www.unhcr.org/publications/legal/58117aff7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-23-to-25-october.html. See also UNHCR position paper on bilateral and/or multilateral arrangements for processing claims for international protection and finding durable solutions for refugees (April 2016), available at www.refworld.org/pdfid/5915aa484.pdf; and UNHCR, guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers (May 2013), available at www.refworld.org/docid/51af82794.html, paras. 1 and 3 (vi).

[5] See UNHCR monitoring visit to Manus Island, para 16. See also the submission by UNHCR on the inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre (November 2016), para. 11, available at www.unhcr.org/58362da34.pdf.

[6] See opinions No. 28/2017 and No. 42/2017, and revised deliberation No. 5, para. 9.

68. As the Working Group has stated in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.

69. In the present case, Mr. Hamedani was detained upon his arrival by the Australian authorities, who held him for about one month before transferring him to the Manus Regional Processing Centre. It is thus clear to the Working Group that Mr. Hamedani was not detained in order to document his entry or verification of identity. On the contrary, the Working Group observes, as the source has pointed out that under sections 189 (1) and 189 (3) of the Migration Act, an unlawful non-citizen must be detained. This is a mandatory requirement for which an individual departmental officer cannot exercise any discretion.

70. However, the Working Group underlines that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality. [7] As the Human Rights Committee has argued in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

> [A]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

71. In its response, the Government of Australia has failed to explain the individualized, specific reasons that would have justified the need to deprive Mr. Hamedani of his liberty while his asylum claim would be considered. Furthermore, it failed to consider any alternatives to detention. On the contrary, as the Government itself clearly states, the purpose of its border protection policies, which include administrative detention, is to provide deterrence to others. It is thus clear to the Working Group that there was no individualized assessment carried out in relation to the need to detain Mr. Hamedani, and the Australian officials simply followed the policy of automatic immigration detention without any assessment of the need to detain or indeed without presenting Mr. Hamedani before a judicial authority. In other words, Mr. Hamedani was subjected to a mandatory immigration detention policy, which the Working Group has already determined to be arbitrary in a number of cases concerning Australia. [8] The Working Group reiterates that such policies are contrary to article 9 of the Covenant and breach the right to seek asylum as envisaged in international law. The Working Group therefore concludes that Mr. Hamedani was detained while exercising his right to seek asylum and his detention is therefore arbitrary, falling under category II.

72. The source has further submitted that the detention of Mr. Hamedani is arbitrary under category IV since he is a refugee who has been subjected to prolonged administrative custody and has not been guaranteed the possibility of administrative or judicial review or remedy. The Government of Australia denies those allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia through such actions as habeas corpus.

73. The Working Group observes that Mr. Hamedani has been in detention since 31 July 2013. While Mr. Hamedani spent part of this time in the Manus Regional Processing Centre, the Working Group has already established that Australia cannot absolve itself of the responsibility in that regard. At the moment, Mr. Hamedani is held in an immigration detention centre in Australia and his only remaining option is to await the discretionary decision of the Minister for Immigration and Border Protection. The Working Group notes

[7] See A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

[8] See opinions No. 28/2017, No. 42/2017 and No. 71/2017.

that Mr. Hamedani has been waiting for such a decision since May 2017 and that the Government has not disputed any of these submissions in its reply.

74. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[9] That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty[10] and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[11] Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[12]

75. The Working Group observes that, since he was detained, Mr. Hamedani has not been admitted before any judicial body that could have examined the need for him to remain in detention, and no judicial body has ever been involved in the assessment of the legality of Mr. Hamedani's detention, which would necessarily involve the assessment of the legitimacy, need and proportionality to detain.[13] In fact, by the Government's own admission, the only avenue of redress available to Mr. Hamedani is to await the discretionary decision of the Minister for Immigration and Border Protection. This, however, is not a judicial body that could review the legality of his detention.

76. The Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[14] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[15] In the case of Mr. Hamedani, it is clear to the Working Group that there was never any consideration of alternatives to detention, which is a further breach of article 9 of the Covenant.

77. The Working Group thus concludes that Mr. Hamedani has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling under category IV.

78. Furthermore, the source submits that the detention of Mr. Hamedani falls under category V, as Australian citizens and non-citizens are not equal before the courts and tribunals of Australia owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in the cited case the High Court held that provisions of the Migration Act requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

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[9] See A/HRC/30/37, paras. 2–3.

[10] Ibid, para. 11.

[11] Ibid, para. 47 (a).

[12] Ibid, para. 47 (b).

[13] See revised deliberation No. 5, paras. 12–13.

[14] See *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[15] See also A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81. See also opinion No. 72/2017.

79. The Working Group is puzzled by the explanation provided by the Government in its reply as to the High Court's decision in that case, as it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future. In other words, the Government has actually failed to explain how such non-citizens can challenge their continued detention after that decision.

80. The Working Group notes the numerous findings by the Human Rights Committee, as referred to in paragraph 76 and footnote 18 above, and also notes that the effect of the decision of the High Court of Australia in the above-mentioned case is such that non-citizens have no effective remedy against their continued administrative detention.

81. In that respect, the Working Group specifically notes the jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.[16]

82. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[17] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Hamedani is arbitrary, falling under category V.

83. Finally, the Working Group notes with concern that the present case is among several cases concerning immigration detention in Australia that has come before it during the past year.[18] All of those cases address the mandatory immigration detention policy and, in all cases, the Working Group has found the detention to be arbitrary.

Disposition

84. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ghasem Hamedani, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

85. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Hamedani without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

86. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hamedani immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

87. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hamedani and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

88. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hamedani has been released and, if so, on what date;

[16] See *F.J. et al. v. Australia*, para. 9.3.

[17] See opinions No. 20/2018, No. 71/2017, No. 42/2017 and No. 28/2017.

[18] Ibid.

(b) Whether compensation or other reparations have been made to Mr. Hamedani;

(c) Whether an investigation has been conducted into the violation of Mr. Hamedani's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

89. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

90. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

91. The Government should disseminate through all available means the present opinion among all stakeholders.

92. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[19]

[*Adopted on 20 April 2018*]

[19] See Human Rights Council resolution 33/30, paras. 3 and 7.

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 22/2018 concerning Liu Feiyue and Huang Qi (China)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 December 2017, the Working Group transmitted to the Government of China a communication concerning Liu Feiyue and Huang Qi. The Government replied to the communication on 19 January 2018. The State is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Huang Qi, born on 7 April 1963, is a citizen of China. He resides in Shizhong District, Neijiang City, Sichuan Province.

5. The source states that Mr. Huang is a prominent journalist. He was the director of the Chinese human rights monitoring website, 64 Tianwang Human Rights Centre,[1] which he established in 1998. After the establishment of the website, the Centre started to disseminate reports about alleged cases of enforced disappearances and trafficking. By the mid-2000s, the Centre had also begun reporting on other alleged human rights violations, and on complaints against government officials.

6. The source reports that Mr. Huang has been targeted by the authorities since he began his journalistic activity. He has served two prison sentences, of eight years in total, which were allegedly handed down in reprisal for his work. In 2003, Mr. Huang was given a five-year sentence for "inciting subversion of State power". In 2009, he was sentenced to three years in prison for "illegal possession of State secrets". According to the source, this sentence relates to Mr. Huang's meeting with families of children who died in schools that collapsed during the 2008 earthquake in Sichuan Province.

7. After each release from prison, Mr. Huang resumed reporting on the human rights situation in China. Mr. Huang and 64 Tianwang Human Rights Centre have received international recognition, including the Reporters Without Borders Press Cyber-Freedom Prize, awarded to Mr. Huang in 2004, and the Reporters Without Borders Press Freedom Prize, awarded to the Centre in 2016.

8. The source reports that, late in the evening of 28 November 2016, Mr. Huang was detained at his residence in Neijiang City by approximately 15 police officers from the cities of Chengdu, Mianyang and Neijiang. Police officers also searched Mr. Huang's home and confiscated some of his possessions. They detained him without showing a warrant or other decision by a public authority. Mr. Huang was then allegedly subjected to incommunicado detention. Furthermore, it is reported that, when Mr. Huang was taken into custody, his mother and a volunteer at 64 Tianwang Human Rights Centre, who has sent messages about Mr. Huang's arrest, were also being held incommunicado by the authorities.

9. The source also states that Mr. Huang was formally arrested on 16 December 2016. He is currently being held in custody at Mianyang City Detention Centre, Sichuan Province, by Mianyang City Public Security Bureau.

10. The source specifies that Mr. Huang's detention was ordered by Sichuan Province Public Security Department. According to the authorities, the legal basis for the detention was article 111 of the Criminal Law on the illegal dissemination overseas of State secrets. The article provides that whoever steals, spies with relation to, buys or unlawfully supplies State secrets or intelligence for a body, organization or individual outside the territory of China shall be sentenced to fixed-term imprisonment of not less than 5 years but not more than 10 years. If the circumstances are especially serious, he or she shall be sentenced to fixed-term imprisonment of not less than 10 years, or life imprisonment. If the circumstances are minor, he or she shall be sentenced to fixed-term imprisonment of not more than 5 years, criminal detention, public surveillance or deprivation of political rights.

11. The source alleges that Mr. Huang was detained in reprisal for his exercise of the rights to freedom of expression and of association through his work at 64 Tianwang Human Rights Centre. Mr. Huang has allegedly suffered acts of torture and other forms of ill-treatment during his detention. The source notes that Mr. Huang was detained at a time when the authorities had intensified the suppression of groups and individuals reporting on alleged human rights abuses inside China. Two more journalists who had been volunteering

[1] See http://64tianwang.com/ (available in Chinese only).

with the Centre were allegedly pressured by the authorities, detained and eventually imprisoned.

12. The source reports that, on 6 April 2016, 64 Tianwang Human Rights Centre published a police document issued in March 2016 by the Sichuan Province Public Security Department. The document ordered the authorities to suppress Mr. Huang's journalistic activity and the reporting by 64 Tianwang Human Rights Centre's website, claiming it to be a reactionary overseas website that specialized in sending information on scandals inside China to foreign countries. The source states that the publication of the document appears to have played a role in Mr. Huang's current detention and has probably made him, his colleagues and his website an even greater target for the authorities. The source thus argues that the authorities have violated Mr. Huang's rights to freedom of expression and of association.

13. According to the source, in February 2017, Mr. Huang's lawyers met with Mianyang City national security officers to discuss his case. Officers allegedly told the lawyers that the case related to State secrets, given the publication of the above-mentioned police document. The source alleges that government officials retroactively classified the police document as "top secret," taking advantage of loopholes in the national State Secrets Law.

14. The source adds that Mr. Huang's case involved various procedural and legal violations. For instance, no official detention notice was provided to Mr. Huang's family when he was taken into custody, in violation of article 83 of the Criminal Procedure Law. The article stipulates that the Public Security Bureau must produce an official notice when placing an individual under detention. The source also states that, during the first few weeks, Mr. Huang was subjected to incommunicado detention. It is alleged that the authorities did not allow him to meet with a lawyer for the first eight months after his arrest. The first visit by Mr. Huang's lawyer only took place on 28 July 2017, eight days after the police recommended his case for indictment. Prior to that date, the authorities refused to allow visits by the legal counsel on the grounds that they might "endanger national security", as Mr. Huang's case allegedly involved "State secrets". The source notes that this restriction, contained in article 37 of the Criminal Procedure Law, is frequently applied by the authorities in cases of detention of human rights defenders. The source adds that article 37 also states that detainees should be given access to a lawyer within 48 hours of making the corresponding request. According to principle 18 (1) and (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a detainee should be entitled to communicate and consult with his or her legal counsel and should be allowed adequate time to do so, a safeguard that Mr. Huang was denied.

15. After the visit to the Detention Centre in July 2017, Mr. Huang's lawyer reported that his client's long-standing health condition had deteriorated further, and that, on 5 July 2017, the authorities at the Detention Centre had stopped providing him with medical treatment. This denial of medical care occurred when several of Mr. Huang's health problems turned life-threatening. His family and supporters thus began to fear that he might die in detention. The source specifies that, in 2010, Mr. Huang was diagnosed with an incurable and potentially fatal condition, which resulted in limited kidney function. Reportedly, Mr. Huang must take nine doses of medication each day to treat his condition. Mr. Huang was frequently hospitalized, most recently just a few months before his current detention. According to the source, Mr. Huang is at risk of rapid renal failure. In addition, he is suffering from hydrocephalus, heart disease, emphysema and the effects of pneumonia. It is reported that he has lost a lot of weight.

16. The source reports that Mr. Huang was interrogated by rotating teams of several dozen investigators, and forced to stand for four to six hours a day over a period of several weeks, despite his weak physical state. Reportedly, officers tried to pressure him to confess to the crimes of which he had been accused while being videotaped. The source notes that this is a common tactic employed by the authorities regarding many other human rights defenders in the past two years. The source observes that the ongoing mistreatment of Mr. Huang is similar to the retaliatory treatment received by him during previous periods of incarceration. It is alleged that Mr. Huang was often tortured during those periods. Acts of torture applied to Mr. Huang included physical and sexual assaults. He was also often

forced to sleep next to the toilet. In 2009, when Mr. Huang was in prison, his lawyers reported that he had two tumours on his chest and stomach, and that he was suffering from headaches and cardiac issues. His lawyers thus requested that the authorities release Mr. Huang on bail for medical treatment. However, the authorities have never responded to this request.

17. The source reports that, in the course of Mr. Huang's current detention, in January 2017, twice in February 2017 and also in April 2017, his lawyers requested the authorities to release him on bail on medical grounds. However, the authorities turned down each application. International and national human rights activists have unsuccessfully called on the authorities to release Mr. Huang on humanitarian grounds, citing his deteriorating health and his alleged arbitrary detention. Mr. Huang's lawyers also submitted a request to Mianyang City Public Security Bureau to make public Mr. Huang's medical history, any medical treatment he has received, his diet and any other information related to his health in detention. However, Mianyang City Public Security Bureau refused to grant this request.

18. The source submits that the denial of medical treatment for Mr. Huang confirms well-documented instances of torture of incarcerated human rights defenders in China. The source argues that Mr. Huang's life-threatening health problems qualify him for release on medical grounds, according to the Measures for Carrying Out Medical Parole for Prisoners issued by the Ministry of Justice. The source states that the failure or refusal by the authorities to provide adequate medical treatment to Mr. Huang constitutes ill-treatment. The source sustains that article 18 of the Regulation on Detention Facilities and article 26 of the Measures for the Implementation of the Regulation on Detention Facilities, which stipulate that incarcerated individuals in China should receive prompt medical care, have not been enforced in the case of Mr. Huang. It is submitted that the ill-treatment of Mr. Huang by the authorities violates, among other international standards, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Basic Principles for the Treatment of Prisoners.

19. The source submits that Mr. Huang was detained solely because of his peaceful exercise of his rights guaranteed by the Universal Declaration of Human Rights. The source concludes that his detention falls within category II (when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20, and 21 of the Universal Declaration of Human Rights).

20. Mr. Huang was previously the subject of a number of joint urgent appeals sent on 8 December 2003, 30 November 2007, 18 June 2008 and 30 July 2009, by the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the situation of human rights defenders. The Working Group acknowledges replies from the Government of China received on 28 February 2008, 11 August 2008 and 18 December 2009.

21. Mr. Liu, born on 5 February 1970, is a citizen of China. He resides in Suizhou City, Hubei Province.

22. According to the source, Mr. Liu is an activist and a journalist. In 2006, he founded the Civil Rights and Livelihood Watch website.[2] The website contained reports on a wide range of alleged abuses of rights based on information collected from and about victims of forced evictions, demolitions and secret detentions, migrant workers denied their rights, unpaid teachers, rural children forced to drop out of school, and activists who were involuntarily committed to psychiatric institutions. In 1998, Mr. Liu joined a branch of the banned China Democracy Party in Hubei Province. Soon afterwards, he began to research and publish articles about non-violent civil and political rights movements. A participant in many advocacy campaigns, Mr. Liu belonged to a group of activists that, in 2003, launched a movement that urged the Government to implement political reforms. In 2004, in an

[2] See http://msguancha.com/ (in Chinese).

effort to promote the right to health, he collected over 500 signatures from individuals seeking more affordable medication.

23. The source reports that, during the evening of 17 November 2016, Mr. Liu was taken into custody by national security officers of Suizhou City. Allegedly, the officers did not show any warrant or other decision by a public authority. They searched his home and confiscated computers, printed materials and other belongings. At that time, Mr. Liu messaged other activists, stating that national security officers had taken him to a "mountain village," referring to a location where he had been detained on previous occasions. On 18 November 2017, he was placed in criminal detention on suspicion of "inciting subversion of State power". On 23 December 2016, Mr. Liu was formally arrested.

24. The source reports that Mr. Liu is currently being held in custody by Suizhou City Public Security Bureau in Suizhou City No. 1 Detention Centre. The legal basis for his detention is article 105 (2) of the Criminal Law on inciting the subversion of State power, which stipulates that those who incite others, by spreading rumours or slander, or by any other means, to subvert State power or overthrow the socialist system, are to be sentenced to a fixed term of imprisonment of not less than five years, criminal detention, public surveillance or deprivation of political rights.

25. The source submits that Mr. Liu's detention is an act of reprisal for his human rights advocacy work, particularly for his reporting of human rights abuses on the Civil Rights and Livelihood Watch website. The source sustains that Mr. Liu was detained when the authorities intensified their suppression of groups and individuals reporting on alleged human rights abuses inside China. On 6 December 2016, the police told Mr. Liu's lawyer that his client had been detained because he had "published articles that opposed the socialist system". In early August 2017, when recommending Mr. Liu's case for indictment to the local prosecutor, the police added the charge of "illegally disseminating State secrets overseas". The source argues that these actions by the police reflect the Government's attempt to curtail Mr. Liu's right to freedom of expression.

26. The source submits that there have been procedural and legal violations throughout Mr. Liu's current period of detention. For instance, Mr. Liu's family did not receive a detention notice after he was taken away on 17 November 2016. This lack of official police notification violates article 83 of the Criminal Procedure Law, which stipulates that a detainee's family must be informed within 24 hours after he or she is taken into custody. The day after Mr. Liu was detained, the police confirmed as much verbally to his family when they went to Suizhou City Public Security Bureau to enquire as to his whereabouts. Despite this verbal confirmation, the police still did not provide an official detention notice. The source adds that officers told Mr. Liu's family not to speak out publicly about his detention, or to seek assistance from the outside world.

27. The source submits that the authorities have attempted to intimidate Mr. Liu's defence lawyers and have obstructed their work on the case. Instances of such obstruction included preventing the lawyers from gaining access to their client. The authorities also prevented lawyers from visiting Mr. Liu for the first six months of his detention. They were thus denied visits on several instances, including on 6 December 2016, 12 December 2016, 21 January 2017 and 23 March 2017. Mr. Liu was only granted his first meeting with a lawyer on 25 May 2017. Since then, Mr. Liu has had several meetings with his legal counsel. The source adds that, soon after Mr. Liu's detention, the judicial authorities allegedly threatened his lawyer, leading to him halting work on Mr. Liu's case.

28. The source reports that, when refusing to allow visits by the legal counsel, the authorities often cited concerns based on the ground of "national security", as Mr. Liu's case involved a crime of "endangering State security". The source notes that this restriction, provided for by article 37 of the Criminal Procedure Law, is frequently applied in cases of detained human rights defenders. The source notes, however, that the same provision of the Criminal Procedure Law also stipulates that a detainee should be given access to a lawyer within 48 hours of making the corresponding request. Moreover, pursuant to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,

a detainee should be entitled to communicate and consult with his or her legal counsel and should be allowed adequate time to do so. Mr. Liu was allegedly denied this safeguard.

29. The source argues that the authorities presented a weak criminal case against Mr. Liu, while apparently aiming to punish him with a lengthy prison sentence. Suizhou City Public Security Bureau extended its investigation several times, a move that is allegedly a common indication that a case has a weak basis for criminal prosecution. On 23 May 2017, the Bureau recommended Mr. Liu's case for indictment. On 8 July 2017, the prosecution sent the case back to the police and extended the period of investigation by one month. On 8 August 2017, Suizhou City Public Security Bureau again announced that it recommended indictment in Mr. Liu's case, having added a serious criminal charge of "illegally disseminating State secrets overseas" under article 111 of the Criminal Law. The source notes that, although the supplementary investigation period had lapsed, the Public Security Bureau reportedly continued its investigation in order to "collect evidence" up to 11 August 2017. The investigation allegedly included interrogating Mr. Liu at the Detention Centre. The source submits that these actions by the authorities violate the provisions of article 171 of the Criminal Procedure Law, pursuant to which the period of supplementary investigation is limited to one month.

30. During Mr. Liu's detention, his lawyers have maintained that he is innocent of any criminal charges, and applied for him to be released on bail. However, the authorities denied this request.

31. The source notes that, prior to his current detention, Mr. Liu was subjected to continuous harassment, beatings and detention by the authorities. The authorities allegedly carried out such acts against Mr. Liu in retaliation for his activism. For instance, the source reports that Mr. Liu was taken into custody in October 2016, shortly before the opening of the Sixth Plenum of the Eighteenth Central Committee of the Communist Party of China. During that period, the police allegedly kept Mr. Liu at a guesthouse, tortured him and threatened him with further punishment if he continued his advocacy work. The authorities have allegedly repeated this warning to Mr. Liu during his current detention. The police also detained Mr. Liu for a short period in August 2016, before the Group of 20 Summit in Hangzhou.

32. The source submits that Mr. Liu has been detained solely due to the peaceful exercise of his rights guaranteed under the Universal Declaration of Human Rights, and that his detentions falls within category II (when the deprivation of liberty results from the exercise of the rights and freedoms guaranteed by articles 7, 13, 14, 18, 19, 20, and 21 of the Universal Declaration of Human Rights).

33. Mr. Liu was one of a number of individuals the subject of the joint urgent appeal sent on 2 March 2011 by the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of expression, the Special Rapporteur on human rights defenders and the Special Rapporteur on torture.

Response from the Government

34. On 8 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 7 February 2018 about the current situation of Mr. Huang and Mr. Liu. The Working Group also requested the Government to clarify the legal provisions justifying their continued detention, and the compatibility of their detention with the obligations of China under international human rights law. In addition, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Huang and Mr. Liu.

35. The Government responded to the regular communication on 19 January 2018. In its response, the Government states that Mr. Huang is a 55-year-old, residing in Neijiang City, Sichuan Province. He is accused of the crime of illegally disseminating State secrets overseas. Mr. Huang has been placed in criminal detention according to law by the public security bodies of Sichuan Province on 28 November 2016. On 16 December 2016, the

prosecution approved Mr. Huang's arrest. Mr. Huang's case has been reviewed and filed for indictment.

36. Furthermore, the Government states that Mr. Liu is a 48-year-old male from Suizhou City, Hubei Province. Having been accused of the crime of inciting subversion of State power, on 18 November 2016, Mr. Liu was placed in criminal detention according to law by the public security bodies of Hubei Province. On 23 December 2016, the prosecution approved Mr. Liu's arrest. On 23 May 2017, Mr. Liu's case was submitted to the local prosecution service for indictment. It was subsequently filed for prosecution on 6 December 2017.

37. The Government also states that China is a country governed by the rule of law, which protects all legal rights enjoyed by criminal suspects according to law. During the period of review for indictment, procuratorial bodies did not find that confessions made to public security organs had been extracted under duress, or that those organs had committed any other legal violations in collecting evidence while investigating Mr. Huang or Mr. Liu. Moreover, the criminal suspects did not file complaints related to the extraction of confessions under duress and any other acts of unlawful evidence collection. Accusations that, among other things, Mr. Huang and Mr. Liu "have been tortured and ill-treated" are inconsistent with case facts.

Further comments from the source

38. On 14 February 2018, the Government's reply was transmitted to the source for its additional comments, with a request to reply by 15 March 2018. The source responded on 14 March 2018.

39. In its response, the source contests the submission by the Government and reiterates that Mr. Huang's case has involved attempts by public security organs to extract a criminal confession under duress, he has been subjected to torture and other forms of ill-treatment and there have been formal complaints filed about such mistreatment.

40. The source notes that Mr. Huang has consistently refused to confess to criminal behaviour during police interrogations, according to individuals familiar with his case. His case was sent for prosecution to the Mianyang City People's Court. Due to Mr. Huang's refusal to plead guilty to the alleged crimes, a move that might have seen him being granted "clemency", for example, in the form of lighter punishment, the Mianyang City People's Procuratorate reportedly recommended that Mr. Huang be sentenced to between 12 and 15 years in prison. The source maintains that Mr. Huang's current detention, the criminal charges against him and any criminal punishment in his regard constitute a violation of his rights to free expression and of association.

41. According to the source, contrary to the Government's claim that Mr. Huang has not been subjected to torture, he continues to be deprived of treatment for serious medical conditions, contributing to fears that he will die in custody. Mr. Huang is not receiving sufficient treatment for nephritis (inflammation of the kidneys), which has developed due to the fact that he suffers from crescentic glomerulonephritis, a potentially fatal kidney condition that has not been treated in detention. Mr. Huang has also faced several other forms of mistreatment in detention. He has reportedly been beaten by guards and by fellow detainees, acting on the orders of the guards. Mr. Huang has not been provided with toilet paper. His living allowance in detention has been frozen, preventing him from purchasing daily necessities. Mr. Huang has reportedly been deprived of healthy food and, due to poor nutrition and untreated medical conditions, he has lost more than 20 kg whilst in detention.

42. The source reports that Mr. Huang's original lawyer filed complaints about the mistreatment of Mr. Huang. This defence counsel also granted interviews to independent media outlets that have reported such abuses. In addition, Mr. Huang's family has written letters to Sichuan Province Higher People's Court and Mianyang City People's Court, appealing for his release on medical grounds. Neither of the above-mentioned authorities have provided a response.

43. Additionally, the source clarifies that the authorities took reprisals against Mr. Huang's legal counsel, first depriving him of his right to defend Mr. Huang, and then

blocking him from practicing his profession. Procuratorial and court officials repeatedly denied requests by Mr. Huang's lawyer for access to his client's criminal case files. It is further alleged that national security officers frequently questioned Mr. Huang's lawyer about his representation of Mr. Huang. On 22 January 2018, Mr. Huang's lawyer received an advance notice of administrative punishment from the Guangdong provincial judicial authorities, informing him that he was going to lose his licence to practice law. After he filed an application to contest this decision, he was granted a hearing with the provincial judicial bureau on 3 February 2018. After the hearing, the judicial authorities rescinded Mr. Huang's lawyer's license to practice law.

44. In relation to the case of Mr. Liu, the source argues that contrary to the Government's response, Mr. Liu's case has involved attempts by public security officials to extract a criminal confession under duress, particularly through pressure applied to his family.

45. It is further reported that, following harassment by national security officers, a member of Mr. Liu's family and a family friend urged him to confess to criminal wrongdoing. In addition, the authorities have closely monitored the content of communications and the channels of communication between Mr. Liu's above-mentioned family member and the outside world.

46. The source reports that, on 12 December 2017, another lawyer met with Mr. Liu in detention, and learned from him that he had been indicted a week earlier for "inciting subversion of State power", but that the "State secrets" charge against him had been dropped. The indictment outlined "six major criminal allegations" against Mr. Liu. The source notes that activities outlined by the prosecutors focus on Mr. Liu's exercise of his rights to free expression, assembly and association. They include:

(a) Writing and publishing articles describing the political system of China as "autocratic";

(b) Writing annual reports critical of human rights violations in China, in particular during police "stability maintenance" operations, and the ongoing use of forced psychiatric detention of human rights defenders;

(c) Publishing articles and commentary about "politically sensitive" events that expose alleged abuses of human rights by the Government;

(d) Planning to publish cartoons and posters that expose alleged violations of human rights by the Government and call for the release of prisoners of conscience;

(e) Conducting interviews with foreign media that expose alleged abuses of human rights in China;

(f) Establishing the Civil Rights and Livelihood Watch human rights website, with the assistance of foreign entities.

47. The source maintains that Mr. Liu's current detention, the criminal charges against him and any criminal punishment in his regard constitute a gross violation of his rights to free expression and association.

Discussion

48. The Working Group notes with appreciation the timely engagement of both the Government of China and the source in providing submissions in relation to the detention of Mr. Huang and Mr. Liu.

49. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

50. In the present case, the Working Group was convinced that Mr. Huang is a prominent journalist in China, that he was the director of the Chinese human rights monitoring website 64 Tianwang Human Rights Centre, which disseminates reports on

alleged enforced disappearances, trafficking, human rights violations and complaints against Government officials.

51. The Working Group was also convinced that Mr. Liu is an activist and a journalist, that he founded the Civil Rights and Livelihood Watch website, which disseminates reports on alleged abuses of rights, for example on forced evictions and demolitions, secret detentions, migrant workers denied of their rights, unpaid teachers, rural children forced to drop out of school, and activists who were involuntarily committed to psychiatric institutions.

52. The Working Group is mindful of the fact that Mr. Huang is accused of the crime of illegally disseminating State secrets overseas, while Mr. Liu stands accused of the crime of inciting subversion of State power.

53. In this regard, the Working Group considers that the above-mentioned charges are so vague and broad that they could, as in the present case, result in penalties being imposed on individuals who had merely exercised their rights under international law. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.[3] Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

54. The Working Group recalls that, following its official visits to China in 1997 and 2004, it emphasized in its reports that vague and imprecise offences jeopardize the fundamental rights of those who wish to exercise their right to hold an opinion, or exercise their freedoms of expression, the press, assembly and religion, and that they are likely to result in arbitrary deprivation of liberty. The Working Group recommended that those crimes be defined in precise terms, and that legislative measures be taken to introduce an exemption from criminal responsibility for those who peacefully exercise their rights guaranteed in the Universal Declaration of Human Rights.[4]

Category II

55. The Working Group is aware that Mr. Huang and Mr. Liu both carry out human rights advocacy work, through the reporting of human rights abuses on the 64 Tianwang Human Rights Centre and the Civil Rights and Livelihood Watch websites. The Working Group was also convinced by the allegations of the source, which were not rebutted by the Government, that Mr. Huang and Mr. Liu were detained for the exercise of their rights as human rights defenders.

56. The Working Group notes that the work of human rights defenders is protected by the Universal Declaration of Human Rights, which recognizes that everyone has the right to hold opinions without interference, the right to freedom of expression which includes freedom to seek and impart information and ideas of all kinds through any media of choice, and the right to freedom of peaceful assembly and of association.[5] The work of human rights defenders is also protected by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which states that everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.[6]

[3] See, e.g., opinion No. 41/2017, paras. 98–101.

[4] See E/CN.4/1998/44/Add.2, paras. 42–53, 106–107 and 109 (b) and (c); and E/CN.4/2005/6/Add.4, paras. 73 and 78 (e).

[5] See Universal Declaration of Human Rights, arts. 19–20.

[6] See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, arts. 1 and 5 (a); and General Assembly resolution 70/161, para. 8, in which the Assembly called upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights

57. The Working Group is therefore of the view that the detention of Mr. Huang and Mr. Liu, being contrary to articles 19 and 20 of the Universal Declaration of Human Rights, is arbitrary under category II.

58. The Working Group refers the matter to the Special Rapporteur on human rights defenders for further consideration of the circumstances of the case and, if necessary, appropriate action.

Category III

59. The Working Group is aware that, on 28 November 2016, Mr. Huang was detained at his residence by a number of police officers, who did not show an arrest warrant or other decision by a public authority. Initially, Mr. Huang was subjected to incommunicado detention. He was formally arrested on 16 December 2016.

60. As the Working Group has consistently argued, holding persons incommunicado is not permitted under international human rights law because it violates the right to challenge the lawfulness of detention before a court. The Special Rapporteur on torture has also argued that the use of incommunicado detention is prohibited under international law (see A/HRC/13/39/Add.5, para. 156). The Working Group therefore considers that the incommunicado detention of Mr. Huang violates articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights.

61. The Working Group was also convinced that, on 17 November 2016, Mr. Liu was arrested by national security officers who did not show any warrant or other decision by a public authority. He was subsequently placed in criminal detention on suspicion of "inciting subversion of State power". On 23 December 2016, Mr. Liu was formally arrested.

62. The Working Group was persuaded that, during the arrests of Mr. Huang and Mr. Liu, the authorities did not inform them of the reasons of the arrest. The Working Group would like to recall that persons deprived of their liberty are to be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language and a means, mode or format that the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty and the right to bring proceedings before the court and to obtain without delay appropriate and accessible remedies.[7]

63. The Working Group also was convinced that the authorities denied Mr. Huang the opportunity to meet with his lawyer for the first eight months after his apprehension, and that the first meeting between Mr. Huang and his lawyer took place only on 28 July 2017. The Working Group is also aware that the authorities prevented lawyers from visiting Mr. Liu for the first six months of his detention. They were thus refused visits on several instances, including on 6 December 2016, 12 December 2016, 21 January 2017 and 23 March 2017. Mr. Liu was only granted his first meeting with his lawyer on 25 May 2017.

64. The Working Group would like to recall that persons deprived of their liberty are to have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension. Upon apprehension, all persons are to be promptly informed of this right.[8] This right entitles persons deprived of liberty to be accorded adequate time and facilities to prepare their case, including through disclosure of information.[9] Legal counsel are to be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation,

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defenders, and in that regard strongly urged the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

[7] See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 7, para. 10.

[8] Ibid., principle 9, para. 12.

[9] Ibid., para. 14.

hindrance or harassment. Authorities are to respect the privacy and confidentiality of legal counsel-detainee communications.[10]

65. The Working Group was convinced that, in the present case, Mr. Huang and Mr. Liu were not informed of their right to legal counsel at the moment of the arrest, and neither of them could communicate nor consult with their legal counsel, nor were they allowed adequate time to prepare their defence in the first eight months of detention, in the case of Mr. Huang, and in the first six months of detention, in the case of Mr. Liu. The right to legal representation is a fundamental prerogative of persons deprived of their liberty in order to be able to guarantee their right to challenge the lawfulness of the detention. Such acts and omissions by the authorities are a violation of due process of law guarantees, and are of such gravity that they render the detention of Mr. Huang and Mr. Liu in violation of articles 9 and 10 of the Universal Declaration of Human Rights. Their deprivation of liberty is therefore arbitrary under category III.

66. In view of the allegations of torture and other forms of cruel or inhumane treatment or punishment by the authorities against Mr. Huang and Mr. Liu, the Working Group refers this case for appropriate action to the Special Rapporteurs on torture and on health.

67. Lastly, and given the continuing international concern regarding the deprivation of liberty of human rights defenders, the Government may wish to consider the present to be an appropriate time to work with human rights mechanisms to bring its laws into conformity with its international obligations under the Universal Declaration of Human Rights. The Working Group would welcome the opportunity to conduct an official country visit to constructively assist the Government of China in this process. Furthermore, the Working Group encourages the Government of China to accede to and to ratify the International Covenant on Civil and Political Rights.

Disposition

68. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Huang Qi and Liu Feiyue, being in contravention of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights, is arbitrary and falls within categories II and III.

69. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Mr. Huang and Mr. Liu without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

70. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Huang and Mr. Liu immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

71. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Huang and Mr. Liu, and to take appropriate measures against those responsible for violations of their rights.

72. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteurs on torture, on health and on human rights defenders, for appropriate action.

Follow-up procedure

73. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Huang and Mr. Liu have been released and, if so, on what date;

[10] Ibid., para. 15.

(b) Whether compensation or other reparations have been made to Mr. Huang and Mr. Liu;

(c) Whether an investigation has been conducted into the violation of Mr. Huang's and Mr. Liu's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of China with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

74. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

75. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

76. The Government should disseminate through all available means the present opinion among all stakeholders.

77. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[11]

[*Adopted on 23 April 2018*]

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[11] See Human Rights Council resolution 33/30, paras. 3 and 7.